**MBF FINANCE BERHAD**

**v.**

**WEE KEE HOCK**

HIGH COURT SABAH & SARAWAK, SIBU
TUAN MUHAMMAD KAMIL BIN AWANG J
[SUIT NO. 31 OF 1988]
28 FEBRUARY 1995

***CONTRACT:*** *Sale of goods - Goods sold to first purchaser - Possession of goods remained with the seller - Whether sale complete - Whether property in goods passes upon payment of purchase price - Seller fraudulently sold goods to second purchaser - Whether seller a mercantile agent in respect of first purchaser - Effect of sale by mercantile agent ss. 1(1) & 2(1) Factors Act 1989 (UK) - Whether second purchaser as bona fide purchaser for value without notice obtained good title - Whether property in goods passed to second purchaser.*

The plaintiff had purportedly bought one Isuzu Trooper from Syarikat Huat Hin (the dealer) which was then let out on hire to one Ngu Wu Chiong (hirer), an employee of the dealer, and the vehicle was accordingly registered in the hirer's name. When the plaintiff bought the vehicle, it did not take delivery of the vehicle nor inspect it, but instead relied on an aknowledgment of delivery receipt produced by the hirer of the vehicle. The hirer then assigned the hire-purchase to one Poh Nang Ping (Poh), and when Poh failed to pay the instalments, the plaintiff tried to repossess the vehicle, only to find the vehicle had vanished. The same vehicle then went on display in the dealer's showroom, where the defendant saw it, bought it and had it registered under his name. He had the vehicle in his possession for a while before he had to surrender it to the police.

The main issue before the Court was who had the legal ownership of the vehicle.

**Held:**

**[1]** Payment of a purchase price alone does not pass the property in the goods to the buyer. There is no sale unless there is a delivery of the goods to the buyer. The dealer never intended to deliver the vehicle to the plaintiff and therefore no title in the vehicle had passed to the plaintiff. The whole transaction was nothing but a colorable device intended to deceive the plaintiff. The plaintiff through its own negligence by not taking the delivery of the vehicle bought had enabled the dealer to occasion the loss upon it and it must sustain the loss.

**[2]** The dealer was a mercantile agent within the meaning of s. 1(1) of the Factors Act 1889 (UK) which is applicable pursuant to s. 5(1) of the Civil Law Act 1956, even as an independent dealer and authorised for one occasion only and by one principal only. It is immaterial that the dealer intended to act fraudulently or for their own benefit or that their authority is limited expressly or by trade or customs. A mercantile agent is empowered to dispose of the goods by virtue of s. 2(1) of the Factors Act 1889.

**[3]** As the dealer was still in custody of the vehicle, the sale of the vehicle, though fraudulently, to the defendant who bought it in good faith and for value without notice, gave the defendant a good title. The sale was complete when the defendant paid the price and took delivery of the vehicle. The property in the vehicle therefore passed to the defendant.

*[Application dismissed; vehicle to be returned to the defendant henceforth; costs to the defendant to be taxed].*

**Cases referred to:**
*Mohamed Mydin v. Ramiah [1965] 1 MLJ 33* ***(refd)***
*Sajan Singh v. Sardara Ali [1960] 26 MLJ 52* ***(refd)***
*Credit Corporation (M) Bhd. v. Malaysia Industrial Finance Corporation & Anor. [1976] 1 MLJ 83* ***(dist)***
*United National Finance Ltd. v. Industrial Resources Ltd. [1986] 2 MLJ 481* ***(refd)***
*Union Transport Finance Ltd. v. Ballardie [1937] 1 All ER 420* ***(refd)***
*Lickborrow v. Mason [1787] 2 TR 63* ***(refd)***
*R v. McDonald [1885] 15 QBD 323* ***(refd)***
*Lim Chui Lai v. Zeno Ltd. [1964] 30 MLJ 314* ***(dist)***
*Ng Ngat Siang v. Arab-Malaysian Finance Bhd. & Anor. [1988] 3 MLJ 319* ***(dist)***
*Cheah Swee Hock v. Public Prosecutor [1961] MLJ 183* ***(refd)***
*Sin Gee Seng v. Wai Wah Trading Co. [1962] 28 MLJ 189* ***(refd)***
*Bishopgate Motor Finance Corporation, Ltd. v. Transport Brakes. Ltd. [1949] 1 KB 322* ***(refd)***

**Legislation referred to:**
Factors Act 1889 (UK), ss. 1(1), (2), 2(1), 9
Sale of Goods Act 1957, s. 27

**Other source referred to:**
*Sale of Goods,* Benjamin, para. 492

*For the plaintiff - Michelle Lau; M/s. Lau & Co.*
*For the defendants - Chew Peng Hui; M/s. Battenberg & Talma*

**JUDGMENT**

**Hj. Muhammad Kamil bin Awang J:**

Syarikat Huat Hin, a dealer in motor vehicles, made two sales in respect of one Isuzu Trooper bearing engine no. 882049 and chassis no. 4515120, which is the subject-matter of this case. The vehicle was registered twice with the Road Transport Department and two registration cards in respect of the vehicle had been issued to two different persons. The vehicle bore two different numbers at various times.

In the first case, the plaintiff purchased the vehicle from Syarikat Huat Hin and let it out on hire-purchase to Ngu Wu Chiong (the hirer), an employee of Syarikat Huat Hin Auto Parts. The vehicle was registered in Ngu's name and the ownership claimed by the plaintiff, which was endorsed on the registration card.

Some months later, the hirer assigned the hire-purchase to one Poh Nang Ping, a poultry farmer. Poh did not pay the instalments under the hire-purchase, and the plaintiff sent a notice to repossess to him and found that the vehicle had vanished.

Shortly after the purported sale to the plaintiff, the same vehicle was on display in the showroom of Syarikat Huat Hin, and the defendant saw and bought it. He took the delivery of the vehicle and had it registered into his own name. He had the vehicle in his possession and use until he had to surrender it to the police.

Here there are two competing claims, the Court has to decide which of the two claimants has the legal ownership over the vehicle.

The evidence of PW1, the credit officer in charge of hire-purchase department in the plaintiff's company at the material time, states that on 29 April 1987 the plaintiff purchased a white Isuzu Trooper, a brand new vehicle, from Syarikat Huat Hin. The vehicle was then let out on hire-purchase to Ngu. The vehicle was registered with the Road Transport Department in Ngu's name and was given a plate number SE 1582.

The plaintiff had had dealings for some years with Syarikat Huat Hin. The business relationship between them had been good until this incident happened. It was Syarikat Huat Hin who introduced the hirer to the plaintiff for a loan to purchase the vehicle. In the application for hire-purchase finance (Ex. P12) it was stated that Ngu was in the employ of Huat Hin Auto Parts drawing a salary of RM3,000 p.m. The guarantor was Syarikat Huat Hin of 9A-B Takang Building, Brooke Drive, Sibu. PW1 stated that no inquiry had been made into Ngu's background. The hirer's application was approved, the purchase was made and the hire-purchase agreement between the plaintiff and the hirer was executed. All seemed normal, the plaintiff had no reason to suspect of anything amiss, and signed all the relevant documents. There was one missing link - at the time of the purchase the plaintiff in fact did not see the white Isuzu Trooper nor inspect it and did not take the delivery of it. There was no evidence that the plaintiff had witnessed the delivery of the vehicle to the hirer. All it got was an acknowledgment, a delivery receipt contained in the hire-purchase agreement (Ex. P9), by the hirer of the vehicle. In other words, the plaintiff took for granted that the delivery receipt by the hirer was true. PW1 said that there was no reason to suspect that the document was not genuine. Learned Counsel for the defendant challenged this and submitted that the easiest way to prove the genuineness of the delivery receipt was to call its maker (the hirer) to testify that he had in fact took the delivery of the vehicle. This was not done. In the cross-examination, PW1 stated:

> The dealings were purely on the basis of documents produced by Syarikat Huat Hin.
>
> I did not know where the vehicle was in fact, I presumed it was with Syarikat Huat Hin.
>
> From the time of loan made and the assignment, I did not know where the vehicle was.
>
> It was possible that the vehicle remained with Syarikat Huat Hin.

It is manifestly clear on the evidence that there had been no delivery of the vehicle taken by the plaintiff or the hirer at the time of the sale.

The fact of delivery of the goods in a sale is vital; without a delivery there can be no sale. In *Mohamed Mydin v. Ramiah* [1965] 1 MLJ 33, the parties had agreed on the sale of a motor lorry and it appeared that a motor vehicle repairer had taken the delivery for repair on behalf of the plaintiff, who was the purchaser. The registration book of the lorry was, however, not handed to the plaintiff. The Federal Court held that the sale of a lorry was complete and effective even though the registration book, which was not a document of title, is not available to the buyer. See also *Sajan Singh v. Sardara Ali* [1960] 26 MLJ 52.

On 24 October 1987 the hirer Ngu took one Poh Nang Ping to see the plaintiff. The then deputy branch manager of Syarikat Huat Hin was also present. The purpose of this visit was to sign a deed of assignment, whereby the hirer assigned the hire-purchase to Poh (assignee). This date is very crucial as will be shown later.

On 24 October 1987, the alleged assignment by the assignor (the hirer) to the assignee, witnessed by the branch manager of Syarikat Huat Hin, was a sham. The fact is that the vehicle was no longer in the possession of the assignor. It had been sold to the defendant on 21 July 1987. It is clear that Ngu was capable of executing a false document, i.e., the deed of assignment. This suggests that Ngu was a very dishonest person, and on the same token Ngu's delivery receipt on P7 appears to be false.

PW1 said that on the date in question, he saw the hirer and assignee get in and out of a white trooper from his office through the glass windows. The white trooper seemed to fit the description of the hired vehicle. PW1 stated under cross-examination that:

> when Ngu (the hirer/assignor) and Poh (the assignee) came, I saw a white Isuzu Trooper. I did not see the number plate of the vehicle. I assumed it was the number plate of the vehicle. I assumed it was the same vehicle.

However, PW1 did not inspect the vehicle as it was the plaintiff's policy not to inspect a vehicle on assignment. He could not be certain that this vehicle was in fact the hired vehicle. Earlier on in evidence, PW1 categorically stated that on the purchase of a brand new vehicle it was the policy of the plaintiff not to inspect the vehicle. The vehicle here had ceased to be a brand new vehicle as it was 6 months old on 24 October 1987.

The assignment had been made by the hirer. The delivery receipt also had been made by the hirer. Assuming that the hirer took possession/delivery of the vehicle, how was it possible that the vehicle was found on display in Syarikat Huat Hin's showroom on 21 July 1987 and in a condition which was new? There is no evidence that SE 1582 was ever on the road. The inference that can reasonably be drawn from these facts is that the vehicle was in the possession of Syarikat Huat Hin all the time.

The defendant bought the vehicle on 21 July 1987, that was well before the assignment date. Since that day the vehicle was in the possession of the defendant all the while. This is an undisputed fact. It is manifestly clear that the assignment was a sham. The whole scenario smacks of a conspiracy, well designed by Syarikat Huat Hin and played by Syarikat Huat Hin together with the hirer and the assignee to cheat the plaintiff.

Although the vehicle was first registered in the name of Ngu, the hirer, the registration does not confer title. See *Credit Corporation (M) Bhd. v. Malaysia Industrial Finance Corporation & Anor.* [1976] 1 MLJ 83, 87. The registration card or commonly called the blue card is not a document of title. See the Privy Council case of *Sajan Singh v. Sardara Ali* (*supra*) and Federal Court in *Mohamed Mydin v. Ramiah* (*supra*).

The endorsement or warning on the blue card, ownership is claimed by the plaintiff is not proof of ownership. See *United National Finance Ltd. v. Industrial Resources Ltd.* [1986] 2 MLJ 481.

In the instant case, it appears that the sale of the vehicle by Syarikat Huat Hin to the plaintiff was not complete because of the non-delivery of the vehicle to the plaintiff (see above). Payment of a purchase price alone does not pass the property in the goods to the buyer. In other words there is no sale unless there is a delivery of the goods to the buyer. *Union Transport Finance Ltd. v. Ballardie* [1937] 1 All ER 420, 424. The plaintiff did not take delivery of the vehicle nor the hirer. It seems that Syarikat Huat Hin had no intention to deliver the vehicle to the plaintiff and therefore no title in the vehicle had passed to the plaintiff. The whole transaction was nothing but a colourable device intended to deceive the plaintiff. The plaintiff through its own negligence by not taking the delivery of the vehicle bought had enabled Syarikat Huat Hin to occasion the loss upon it (the plaintiff) and it must sustain the loss. This is well reflected in *Lickborrow v. Mason* [1787] 2 TR 63, 70 Ashburst J said:

> Whenever one of two innocent persons must suffer by the acts of a third he who has enabled such third person to occasion the loss upon him and he must sustain the loss.

It is a mistake to suppose that, because the plaintiff had entered into a sale contract with Syarikat Huat Hin to buy the vehicle which gives the latter a right to possession of the vehicle, Syarikat Huat Hin at once become a bailee of the plaintiff. A bailment consists in the delivery of an article upon a condition or trust; see *R v. McDonald* [1885] 15 QBD 323. This is not the case here.

Learned Counsel for the plaintiff cited three cases in support of its case, *viz. Lim Chui Lai v. Zeno Ltd.* [1964] 30 MLJ 314, *Ng Ngat Siang v. Arab-Malaysian Finance Bhd. & Anor.* [1988] 3 MLJ 319 and *Credit Corporation (M) Bhd. v. Malaysia Industrial Finance Corporation & Anor.* [1976] 1 MLJ 83. These cases can be distinguished. The fact of delivery was not disputed.

In *Lim Chui Lai v. Zeno Ltd.* (*supra*). Company A had a contract with Petaling Jaya Authority to construct culverts. The respondent supplied the culverts for the project and delivered them at the project site. The contract was later cancelled by the Petaling Jaya Authority. The respondent informed Petaling Jaya Authority that the culverts belonged to the respondent. Unknown to the respondent, company A had sold the culverts to the appellant. The Federal Court held that company A was merely a bailee.

In *Ng Ngat Siang v. Arab-Malaysian Finance Bhd. & Anor.* (*supra*), the plaintiff bought a car from the 2nd defendant which car was financed by MUI Finance. Having paid MUI Finance, the 2nd defendant still retained possession of the registration card and he sold the car to B who obtained finance from the 1st defendant. Siti Norma J held that after full payment made by the 2nd defendant to MUI Finance, the plaintiff had acquired the ownership of the car. The 2nd defendant dealing in the car was therefore illegal.

*Credit Corporation (M) Bhd. v. Malaysia Industrial Finance Corporation & Anor.* (*supra*) has a superficial resemblance of this case, where the plaintiff purchased the car and entered into a hire-purchase with a hirer. The 1st defendant purchased the car from a third party and let it out on hire-purchase to the 2nd defendant. The plaintiff terminated the hire-purchase and repossessed the car. Abdul Hamid J (as he then was) held that under the hire-purchase agreement and the Hire-Purchase Act, until the hirer exercised his option to purchase, no property in the car passed to the hirer.

It appears that having sold the vehicle to the plaintiff, Syarikat Huat Hin still had it in its possession. It was on display in its showroom. On 21 July 1987 the defendant saw it in the showroom, during ordinary business hours, and inspected it. It was new, the interior of the vehicle was still under plastic wrappings and the odometer showed 100 km. The ignition keys were with Syarikat Huat Hin. There was nothing to show or indicate that the vehicle had been sold. The defendant bought the vehicle, paid the price and registered it with Road Transport Department in the name if his firm, Hoe Hup No. 7 Shipping Co. (Ex. D3). This piece of evidence was undisputed.

The defendant was a co-proprietor of Hoe Hup No. 7 Shipping Co. On two previous occasions, the defendant had bought two vehicles from Syarikat Huat Hin. All these vehicles were kept by the defendant for his own use.

The defendant had a BMW car which he sold to Hii Tiong Kuok. With the proceeds of sale of this BMW, the defendant paid cash to Syarikat Huat Hin which was duly acknowledged on the invoice itself (Ex. D4). The defendant also retained the old plate number SE 55 (on the BMW car) and had it transferred to the new trooper (Ex. D3).

Syarikat Huat Hin was a mercantile agent within the meaning of s. 1(1) of the Factors Act 1889 U.K. The Factors Act 1889 U.K. is applicable in Malaysia by virtue of s. 5(1) of the Civil Law Act, 1956. See *Cheah Swee Hock v. Public Prosecutor* [1961] MLJ 183 and *Sin Gee Seng v. Wai Wah Trading Co.* [1962] 28 MLJ 189, 191. Even as an independent dealer in vehicles Syarikat Huat Hin is a mercantile agent; even if authorised for one occasion only

or by one principal only. It is immaterial that Syarikat Huat Hin intended to act fraudulently or for their own benefit or that their authority was limited expressly or by trade customs. (Benjamin's *Sale of Goods* para. 492).

Powers of mercantile agent with respect to disposition of goods are to be found in s. 2(1) of the Factors Act 1889, which provides as follows:

> Where a mercantile agent is, with the consent of the owner, in possession of goods ... any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Section 1(2) Factors Act 1889 provides:

> A person shall be deemed to be in possession of goods ... where the goods are in his actual custody ...

Learned Counsel for the plaintiff had urged the Court to apply s. 27 of the Sale of Goods Act 1957 on this point. With respect, I cannot accede to the request as the learned Counsel should have been cautious and more vigilant that the Sale of Goods Act 1957 (West Malaysia) has no application in Sarawak; this is so clearly stated in its preamble.

Section 9 of the Factors Act 1889 reads as follows:

> Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods ... the delivery or transfer, by that person ... of the goods ... under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner.

As Syarikat Huat Hin was still in custody of the vehicle, the sale of the vehicle, though fraudulently, to the defendant who bought it in good faith and for value without notice, gave the defendant a good title. The sale was complete when the defendant paid the price and took delivery of the vehicle. The property in the vehicle passed to the defendant. Thus, the defendant is the legal owner of the vehicle SE 55.

As is well known, the common law rule of *nemo dat quod non habet*. As observed by Lord Denning in *Bishopgate Motor Finance Corporation, Ltd. v. Transport Brakes Ltd.* [1949] 1 KB 322 at p. 336:

> In the development of our law, two principles have striven mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.

In my judgment, on the evidence, the defendant had a good title to the vehicle. The vehicle must be returned to the defendant henceforth. Costs to the defendant to be taxed, unless agreed.